No. 5663

United States Circuit Court of Appeals for the Ninth District

B. J. RUCKER,
Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This is a proceeding to review the decision of the United States Board of Tax Appeals.

The facts as found by the Board of Tax Appeals are as follows:

> "B. J. Rucker was married in December, 1904, and he has lived continuously with his wife since that time. At the time of his marriage Rucker owned a one-half interest in the copartnership of Rucker Brothers, the assets of which consisted of lands and town lots and some shares of stock in the Rucker Bank. Rucker Brothers were engaged in the real estate business at the time of Rucker's marriage, but in 1907 or 1908 the firm entered into the logging and sawmill business. The lands and

town lots owned by the partnership at the time of Rucker's marriage were nonproductive properties from which there has been no income from the time of his marriage to the present time. In fact they have paid in taxes several times what the property would sell for today.

"The profits earned by the panrtership of Rucker Brohters have come from enterprises they have engaged in, such as timber and sawmill and logging operations for which the firm borrowed money and started. They (17) have bought most of their timber on the installment plan, making only a small initial payment therefor.

"Rucker has kept no record of the property he had at the time he was married, nor of what he has accumulated subsequently to marriage.

"Rucker Brothers purchased a quantity of timber from the Puget Mill Company in 1917 at a total purchase price of $625,000 for which they paid $5,000 in cash and the balance of $620,000 in promissory notes extending over a period of several years, all of which notes were signed by W. J. and B. J. Rucker for the partnership. A portion of that timber was later sold at a profit of $80,000. The portion of that timber that was not sold was cut and sawed at their own sawmill and was paid therefor as it was cut and removed.

"During the period 1907 to 1916 the firm of Rucker Brothers borrowed several sums of money for use in the partnership.

"All of Rucker's property at the time of his marriage was his equity in the partnership and all of his income has been from the partnership distributions.

"Rucker filed an individual income tax re-

turn for the year 1919 on March 15, 1920, showing therein as his share of the partnership distribution $62,741.12, also salary received from the partnership of $9,000, making a total net income reported of $71,741.12.

"Mrs. B. J. Rucker had no separate property in 1919. Mrs. Rucker filed an individual income tax return for the year 1919 on May 5, 1921, reporting $35,870.56, one-half of the total income reported by Rucker in his original return. On May 5, 1921, Rucker himself filed an amended individual income tax return showing therein one-half of the total net income reported by him in his individual return of $35,870.56."

Transcript of Record, No. 5663, pp. 22-23-24.

On these facts the Board of Tax Appeals held that the Commissioner of Internal Revenue had correctly held that the entire distributive share of the income of B. J. Rucker in the partnership of Rucker Brothers was separate property.

Transcript of Record, No. 5663, p. 29.

The sole question to be determined by the court is whether the facts as found by the Board of Tax Appeals support the decision of that Board.

Petitioner seeking a reversal of that decision has brought the case to this court for review.

SPECIFICATIONS OF ERROR

1. The Board erred in holding that all of said petitioner's distributive share of the income of

Rucker Brothers for 1919 was the separate income of petitioner.

2. The Board erred in failing to hold that all of said petitioner's distributive share of the income of Rucker Brothers for 1919 was the community property of said petitioner and his wife.

3. The Board erred in its conclusions.

Transcript of Record p. 33.

ARGUMENT

As the different specificatitons of error raise the same question thy may all be discussed together.

No question of fact is involved in this proceeding. The petitioner accepts the facts as found by the Board of Tax Appeals. But he urges that the conclusions drawn from these facts by the Board of Tax Appeals are erroneous.

The question involved is the proper construction of the community property statutes of the State of Washington.

The statutes pertinent to the inquiry are as follows:

Section 6890 of Remington's Compiled Statutes: Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he

may manage, lease, sell, convey, encumber or devise by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

Section 6891: The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

Section 6892: Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

Sections 6890 and 6891 define separate property and Section 6892 provides that all property not acquired or owned as prescribed by the next two pre-

ceding sections acquired after marriage shall be community property.

The profits were made from timber bought on credit during the existence of the marriage community of petitioner and his wife. (Transcript p 23.)

Notes were given to evidence this indebtedness, signed by W. J. and B. J. Rucker for Rucker Bros. (Transcript, p. 28.)

From these facts the appellants contend that all of the income reported by the said B. J. Rucker and wife was bonafide community income and was properly reported one-half as the income of B. J. Rucker and one-half as the income of his wife, Ruby Rucker.

It is the well established rule that the Federal Courts follow the State Courts in the construction of State Statutes.

> "Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the Supreme Court of the United States in considering the nature of the contract right relied upon.
>
> "State decisions establishing a rule of property will be followed by the Supreme Court of the United States when called upon to interpret the state law, if it is possible to do so.
>
> "The community system of property was not destroyed, so as to make it impossible for com-

munity or common property to exist, by Wash. act 1893, giving the administration and disposition of the community property to the husband."

Warburton v. White, 176 U. S. 484, 44 Law Ed. 555.

Under the laws of the State of Washington as construed by the Supreme Court the following legal conclusions are firmly established.

1. That all property acquired by husband and wife or either of them during marriage is presumed to be community property and the burden of proof is on the person claiming the same to be separate property.

2. The property acquired by husband and wife or either of them during the marriage relation on borrowed capital is community property.

3. That separate property of either husband or wife so mixed or intermingled with the community as to be incapable of accurate segregation becomes community property.

4. That the rents, issues and profits of community property and the earnings of the husband, and of the wife while living with the husband, is community property and of course community income.

The first proposition is sustained by the following authorities:

"It is settled by the courts where community property statutes exist that property acquired

by the wife during her coverture in her own name is prima facie common property."

Lemon vs. Watterman, 2 W. T. 485.
Yesler vs. Hockstettler, 4 Wash. 349.

"Real property acquired after marriage by deed expressing a money consideration is presumed community property until the contrary is shown by clear and convincing proof."

Yesler vs. Hockstettler, 4 Wash. 349.
Freeburger vs. Caldwell, 5 Wash. 769.
Curry vs. Catlin, 9 Wash. 495.
Woodland Lumber Co. vs. Link, 16 Wash. 72.
Armstrong vs. Oakley, 23 Wash. 122.
Dormitzer vs. Ger. Sav. & Loan S., 23 Wash., 132.

"Where a deed was on its face a conveyance of land for a valuable consideration, prima facie the land conveyed was community property and the burden of proving otherwise is upon the opposing grantee."

Hill vs. Young, 7 Wash., 33.

"A conveyance taken during coverture is prima facie presumed to be community property."

Sackman vs. Thomas, 24 Wash., 660.
Mattson vs. Mattson, 29 Wash., 417.

"The presumption that property acquired by a purchase by the wife during marriage is community property can only be overcome by clear and satisfactory evidence."

Denny vs. Schwabacher, 54 Wash., 689.

"The presumption that all property acquired after marriage is community property applies

whether the legal title is in the name of the wife or the husband."

Patterson vs. Bowes, 78 Wash., 476.

"Property acquired after marriage by eihter husband or wife or both is presumed to be community property, the burden resting upon persons asserting a separate character to establish that fact by clear, certain, and convincing evidence."

In re Slocum estate, 83 Wash., 158.

"Where a husband acquired real property in this State during the marriage relation it is presumed to be community property and the burden rests upon the spouse asserting its separate character to establish the fact by clear and satisfactory evidence."

Plath vs. Mullins, 87 Wash., 403.

"An automobile purchased by a husband from his 'mining operatitons' one year following a division of community property with his wife is presumptively community property, the burden being upon him to establish that it was purchased with property previously set aside to him."

Marston vs. Rue., 92 Wash. 129.

"Real estate purchased on credit of the community *although afterwards paid for with the husband's separate property* is community property." (*Italics are ours*).

Katterhagen vs Meister, 75 Wash. 112.

The following authorities sustain the second proposition:

"Lands purchased by a wife with the proceeds of a loan secured by a mortgage on her

separate property becomes the common property of husband wife."

Yesler vs. Hochstettler, 4 Wash. 349.

"The principal question argued at the rehearing was whether property purchased by a married woman having no separate estate, with borrowed money, becomes her separate property or property of the community. The question was squarely decided in *Yesler vs. Hochstettler*, 4 Wash. 349 (30 Pac. 398). The decision of that case was overlooked in the discussion of this question in the former opinion. In that case the question is exhaustively discussed and the authorities fully reviewed. In the course of the opinion the court say:

'There can be no doubt that if a married woman, under the act of 1881, borrows money entirely upon her personal credit, the money and whatever she busy with it becomes common property,—'

"Without again attempting to review the authorities, we are disposed to think that the statute itself necessitates that conclusion."

Main vs. Scholl, 20 Wash. 205.

"The loan of money to a wife to purchase a hotel business while living with her husband though he was away much of the time and she ran the hotel constitutes a community debt."

Fielding vs. Ketler, 86 Wash. 194

After citing the sections defining separate and community property the court say:

"Under these sections, we have held that the proceeds of a loan to husband and wife, and property purchased therewith, though the money was borrowed on the *security of the sep-*

arate property of one spouse, would constitute community property. Yesler vs. Hochstettler, 4 Wash. 349, 30 Pac. 398; Main vs. Scholl, 20 Wash, 201, 54 Pac. 1125; Heintz vs. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937." (*Italics are ours*).

Graves vs. Columbia Underwriters, 93 Wash. 198.

As to the third proposition the finding of fact is as follows:

"Rucker has kept no record of the property he had at the time he was married nor of what he has accumulated subsequently to marriage." (*Transcript* p. 23).

"In regard to the money in the bank, it is impossible to segregate that as to its sources. Its separate and community natures have become so confused that the court cannot apportion them, and the favor with which community property is regarded and the presumptions in favor of it are such that we must agree with trial court that these funds in bank are the property of the community and not subject to the appellant's judgment."

119 Wash. 287, *Jacobs vs. Hoitt.*

"So we have held that, where separate funds have been so commingled with the community funds as to make it impossible to trace the former or tell which are separate and which are community funds, all funds or property into which they have been invested belong to the community. Yesler vs. Hochstettler, 4 Wash. 349, 30 Pac. 398; Doyle vs. Langdon, 80 Wash. 175, 141 Pac. 352; In re Buchanan's Estate, 89 Wash. 172, 154 Pac. 129. Such is the situation here and we hold that the money

and the property into which it was vested belonged to the community."

In re estate of Carmack, 133 Wash. 374.

"When either spouse claims that his separate property has been commingled with community funds he must support by affirmative proof his claim to distinct articles or parcels or to a share of some mass or parcel, or he must fail."

McKay on Community Property, Sec. 323 (Sec. Ed.)

As to the fourth proposition:

"Property acquired by either spouse during the coverture, otherwise than by gift, bequest, devise or descent, is presumptively community property."

Union Sav. & Trust Co., vs. Manney, 101 Wash. 279.

"It is conceded that the property in dispute was acquired and improved by community funds *earned* after marriage. The statute statute makes such property community property."

In re Parker's estate, 115 Wash. 60.

The interest of petitioner in this timber, under an unbroken line of decisions, was the community property of himself and wife and any profit realized therefrom was community income of petitioner and wife.

The decision of the Board of Tax Appeals on this branch of the case is based solely on the decision of the Supreme Court of the State of Washington,

In re: *Brown estate*, 124 Wash. 273. The Brown case was decided on the authority of *Jacobs vs. Hoitt* 119 Wash. 283 and *Finn vs. Finn*, 106 Wash. 137. In both of these cases the facts were entirely different from the facts of the case at bar In *Finn* vs. Finn the property was purchased and partly paid for by the wife with separate funds and the balance secured by a joint note and mortgage upon her separate property. These facts were held to overthrow the presumption of community property even though the property was acquired during the marriage relatiton.

In *Jacobs vs. Hoitt* the holding of the court was that the status of the bakery plant and business acquired before marriage by the use of separate funds and the pledging of separate credit is separate property. In that case Mr. Jacobs signed the note in question before his marriage.

In the case at bar, Mr. Rucker signed the note some 10 to 15 years after his marriage, and a note signed by the husband during the existence of the marriage relatiton is presumptively an obligation of the community.

> "Where a promissory note is executed by the husband as principal, it raises a presumption in favor of the community character of the debt."
>
> *Reed vs. Loney*, 22 Wash. 433.

"Notes given by a corporation and married men, who were stockholders, for the purchase of an automobile to be used as a prize for the benefit of the corporate business are presumptively for the benefit of the communities, and create a community debt, unless the presumption is rebutted by showing that the stock was the separate property of the husbands; the test being whether the transaction was carried on for the benefit of the community, not whether it resulted in a profit."

Way vs. Lyric Theatre Co., 79 Wash. 275.

"Where a note signed by one of the trustees of a corporation was given to defray expenses in securing a contract for the corporation, which, if secured would promote a sale of the community property of the trustee, the note was the community debt of the trustee and his wife."

Peter vs. Hansen, 86 Wash. 413.

"In the absence of any evidence to overcome the same, the presumption is that a note, signed by the husband alone, constituted a community debt."

Denis vs. Metzenbau, 124 Wash. 86.

"Every debt created by the husband during the existence of marriage is prima facie community debt and a sale of land on execution of a judgment rendered for such debt will divest the title of the community in the land."

Calhoun vs. Leary, 6 Wash. 17.

"Any liability incurred by the husband in the prosecution of any business is prima facie a charge against the community; and the presumption to that effect will continue in force

until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit if profit had been realized therefrom."

"The rommunity character of a debt is not changed by the fact that it is evidenced by the negotiable note of the *husband alone* and a judgment rendered upon such note is prima facie enforceable against the property of the community."

McDonough vs. Craigue, 10 Wash. 239.

"The debt upon which a judgment is rendered is prima facie that of the community when the community has been in existence some years prior to the rendition of judgment.

"The complaint in an action by a wife to set aside a Sheriff's deed of the community property does not state a cause of action when it contains no allegation showing that the indebtedness upon which judgment had been rendered was that of the husband alone and enforceable only against his separate estate."

Byrant vs. S. & P. Mill Co. 13 Wash. 692.

"The property of the community is liable for an obligation of suretyship incurred by the husband in behalf of a corporatiton in which he is an officer and stockholder, in order to protect the property and business of the corporation, when, under all the circumstances of his relations with the corporation, it is to be presumed that he was acting for the community, and that any benefits which might have grown out of his connection with such corporatiton would have belonged to the community"

Horton vs. D. K. Banking Co. 15 Wash. 399.

SUMMARY

Under the Statutes of the State of Washington, as construed by the Supreme Court of that State, the profits realized on this timber was community property.

The Federal Courts will follow the construction placed upon said Statutes by the highest court of the State. The authorities relied upon by the Board of Tax Appeals in rendering a decision adverse to petitioner do not support the conclusion placed upon them by the Board of Tax Appeals.

The decisions relied upon by the Board of Tax Appeals were made upon an entirely different set of facts than exist in the case at bar.

The decision of the Board of Tax Appeals is manifestly erroneous and therefore should be reversed.

Respectfully submitted,

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